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COMMITTEE ON THE BUDGET

Congress of the United States
House of Representatives
Washington, DC 20515–0504

TO: House Republicans
FM: Tom McClintock
DT: February 6, 2024
RE: The Mayorkas Impeachment

> ***ROPER**: So! Now you'd give the Devil benefit of law!*
> ***MORE**: Yes. What would you do? Cut a great road through the law to get after the Devil?*
> ***ROPER**: Yes! I'd cut down every law in England to do that!*
> ***MORE**: Oh? And when the last law was down, and the Devil turned round on you, where would you hide, Roper, the laws all being flat? This country is planted thick with laws, from coast to coast — man's laws, not God's — and if you cut them down — and you're just the man to do it — do you really think you could stand upright in the winds that would blow then? Yes, I'd give the Devil benefit of law, for my own safety's sake!*
> --- A Man for All Seasons

The Homeland Security Committee has reported two articles of impeachment against Secretary of Homeland Security Alejandro Mayorkas: "Willful and Systemic Refusal to Comply with the Law," and "Breach of Public Trust." The articles accurately summarize the enormous economic and social damage the Administration's border policies have done to the American people. They make a compelling case that this policy is deliberate and that the administration callously disregards the harm it is doing. They show that the administration's policy is the result of its reversing the successful policies of the Trump administration. They are unassailable in showing that the nation's immigration laws are deliberately being minimized by poor enforcement.

The problem is that they fail to identify an impeachable crime that Mayorkas has committed. In effect, they stretch and distort the Constitution in order to hold the administration accountable for stretching and distorting the law.

In preparation for the adoption of these articles, the HSC issued a paper dated January 9th to make the legal case for impeaching Mayorkas. During the Trump impeachments, the parties' roles were reversed. In the first impeachment, House Democrats, unable to prove actual crimes, simply invented similar terms to those the HSC has reported; in that case, "Abuse of Office" and "Obstruction of Congress." Republicans ridiculed these legal inventions then, as Democrats are now, bringing to mind Lincoln's observation that the parties look like two drunken men fighting their way into each others' overcoats.

The gist of their argument is that the Founders didn't actually define impeachment as "treason, bribery, or other high crimes and misdemeanors" when they wrote it. (James Madison). What they really meant was "whatever a majority of the House of Representatives considers it to be at a given moment in history." (Gerald Ford). This is the difference between a constitutional republic based on the rule of law and a "living" Constitution.

Ironically, the HSC's primary source of legal support is Democratic partisans like Lawrence Tribe and Michael Gerhardt when they were arguing in favor of impeaching Trump. But beware: today those same authorities are singing a very different tune. They were quick to justify a Democratic House impeaching a Republican President, but now they find no merit in a Republican House impeaching a Democrat. Either they have had a remarkable legal epiphany and now agree that impeachment is a narrowly defined power, or they have simply failed Alan Dershowitz's "shoe is on the other foot test." In either event, the HSC should be careful not to risk its reputation – and that of the House of Representatives -- by basing such a momentous step on such soft and shifting sand.

A safer place for the House to stand is with respected legal scholars like Alan Dershowitz, who has made consistent legal, historical and logical arguments throughout the years on the subject of impeachment, whether the target has been a Republican or a Democrat. Of particular note is Dershowitz's book, "The Case Against the Democratic House Impeaching Trump." Although Professor Jonathan Turley takes a broader view of impeachment than Dershowitz, he, too, believes the HSC has not charged a constitutionally impeachable offense. Both argued against the impeachments of Trump for the same reasons.

We must never allow the left to become our teachers, for theirs is a world of situational ethics and fluid law, toxic to a constitutional republic founded on the rule of law.

The HSC argues that the Founders never intended that impeachment be limited to crimes, citing one side of the debate that started at the Constitutional Convention. But its conclusion is clearly contradicted by the actual deliberations and actions of the Convention.

The central mechanism in our Constitution is the separation of powers – the fact that equal and independent branches separately administer the distinct powers of government. The Founders recognized that impeachment was an important check on the executive, but feared that if it wasn't narrowly confined to actual crimes, it could be abused to settle political scores, which would gut the independence of the executive.

It is true that some of the delegates argued for exactly the expansive grounds the HSC seeks today, **but every one of these proposals was specifically rejected by the Convention's majority**. Although they borrowed certain terms from British usage – "impeachment" itself, for example, as well as "high crimes and misdemeanors" – they also made clear they envisioned a very different mechanism from that which had roiled English politics for centuries.

Many state constitutions took the expansive view at the time, including such grounds as "maladministration," "corruption," "misconduct" and "other means by which the safety of the commonwealth may be endangered."

The Convention began with the expansive language advocated by the HSC: "malpractice or neglect of duty."

But as the Constitution took shape, these words were jettisoned because they were destructive of its central architecture. Gouverneur Morris warned that "we should take care to provide some mode that will not make him (the executive) dependent on the legislature," and counseled that the grounds for impeachment "ought to be enumerated and defined."

As deliberations continued, "treason, bribery or corruption" emerged from the Committee on Details and then was modified to "neglect of duty, malversation or corruption."

But then, this too, was dropped from the drafts. The matter was referred to another committee, the Committee of Eleven, which in keeping with the evolving

discussions, recommended on September 4th that the grounds be limited to "treason or bribery." Period.

The critical discussion came four days later, on September 8th, when George Mason objected to "treason and bribery" as being too narrow and proposed to add, "maladministration." Madison then made the defining argument, "So vague a term will be equivalent to a tenure pleasing to the Senate." Rejecting "maladministration," the delegates substituted "other high crimes and misdemeanors," and the language was agreed to.

So what does that mean? Clearly, the Founders worried that the power of impeachment could be used to settle political disputes, and so searched for limiting language to avoid such abuse. We know from their deliberations what high crimes and misdemeanors are not. They are not "maladministration," "malversation," "malpractice," "neglect of duty," or "corruption," all of which Mayorkas is guilty of, all of which the HSC believes justify impeachment, and all of which the American Founders specifically rejected.

When the HSC argues that the Founders sought to enlarge the power of impeachment from the outset, it is precisely stating the opposite of the truth. The entire history of the Convention was to be wary of this power and accordingly to confine it to the law.

It is true that during the Convention, charges were then taking shape in England for the impeachment of the Governor of Bengal, Warren Hastings. He was ultimately charged with "high crimes and misdemeanors," and thus some speculate this must have been what the Founders had in mind. Hasting's chief prosecutor, Edmund Burke, described these grounds as dishonoring the national character, subverting the laws, rights and liberties of the people of India and many other similar misdeeds, most of which could be accurately described as maladministration and malversation – and few of which were actual crimes. Scholars recognize the seven-year trial that began in 1788 and ended with Hastings' acquittal, was, in fact, a policy dispute over Britain's role in India. Yet we know the Founders had already explicitly rejected these as grounds for impeachment in the American plan for fear they would conflate actual crimes with policy disagreements.

More to the point, if "maladministration" were too "vague a term," in the view of the Founders, why would they replace it with an even vaguer term? We

are then left with the plain meaning of the words, "crimes and misdemeanors" that are "high" – that is, related to the conduct of the office. For example, Bill Clinton clearly committed a crime, perjury, but not a high crime related to the office. He was wrongly impeached by the House, quickly acquitted by the Senate and Americans expressed their disapproval of this partisan exercise in the next election.

Some reject the literal use of the term because there were few federal crimes at the time. They forget that during this period the English Common Law formed the predominate legal framework of the nation and was ubiquitous throughout contemporary jurisprudence.

"Treason, bribery, or other high crimes and misdemeanors." These comprise a single class of acts: violations of law. The Constitution speaks of "conviction" of these offenses after trial in the Senate. One is not "tried" and "convicted" of bad judgment or incompetence. One is only tried and convicted of crimes.

The HSC argues that "high crimes and misdemeanors" in British usage extended beyond actual crimes to injuries to the state, and they are correct. But the Founders took a very different view of impeachment. In British usage, Parliament could impeach anyone – in or out of office -- and impose any sanction it wished, including death. The American version limited the power to removing officials from office and disqualifying them from future office. The American model of impeachment was as different from the English model as the Congress is from the Parliament.

Let us look also to the fundamental architecture of the Constitution to understand the reason the Founders were so careful to narrowly define grounds for impeachment. The British constitution blends executive, legislative and judicial functions – the very definition of tyranny as Madison put it. Just as with impeachment, the Founders borrowed words and concepts from the British experience, but heavily modified them.

Carefully separating the powers that the British combined was at the center of the Convention's deliberations, and explains its care in limiting the impeachment powers of the legislative branch.

This is particularly obvious when discussing an inferior officer of the executive branch. "The executive power shall be vested in a President of the United States." All of it. There's a reason for this: they wanted a great big food

fight when decisions were being made (welcome to Congress), but once made, they wanted a single will to carry it out. Thus, the executive power is held exclusively by the President and every exercise of it must flow from him through his subordinates.

These officers cannot serve two masters – they must be answerable to the President alone. For Congress to impeach them for carrying out the will of the executive is utterly destructive of the executive powers. Senator Kevin Cramer made an important comment the other day: impeachment should be reserved for officials who don't have bosses. Ultimately, a cabinet official acting (or not acting) with the delegated authority of the executive must be answerable to the executive. If Congress wants him to do one thing and the President another, his duty is always to the President.

The logic should be obvious. A cabinet secretary's job is to carry out the will of the President. How can he be impeached for not doing his job because he is doing it? True, the acts must be within the parameters of the Constitution, but as Dershowitz has long maintained, as long as the acts are within the constitutional powers of the executive, those acts are not impeachable, no matter how foolish, corrupt, damaging or egregious.

A cabinet official can be removed for committing a crime relating to the office, but this is very different from removing him for carrying out the orders of the President within the sphere of the President's executive powers. This is the bright line the HSC would cross.

One thing can be readily admitted: this has been vigorously debated since the ink dried on the Constitution. It is not difficult to find many of the Founders expressing different sentiments, because the issue divided them just as it divides us. But actions speak louder than words, and the actions of the Constitutional Convention were solely consistent with a most limited view of impeachment.

The HSC looks to commentaries such as Hamilton in Federalist 65 for refuge. It quotes his description of impeachment as a remedy for "the misconduct of public men…from the abuse or violation of some public trust." He calls them "POLITICAL" involving "injuries done to the society itself."

But this observation is immediately followed by what reads as a tailor-made warning to the House: "The prosecution of them for this reason, will seldom fail to

agitate the passions of the whole community and to divide it into parties, more or less friendly or inimical, to the accused. In many cases, it will connect itself with the pre-existing factions and will enlist all their animosities, partialities, influence and interests on one side, or the other, and in such cases there will always be the greatest danger that the decision will be regulated more by the comparative strength of parties than by the real demonstrations of innocence or guilt."

That's an eloquent plea for caution and self-restraint, but there's more. Note the words Hamilton chooses: "prosecution," "innocence" or guilt." In the same passage, he speaks of "offenses" and "a well constituted court for the trial." In the context of this passage, "POLITICAL" clearly relates to their public duties (the "high" in "high crimes") and not to political disputes. Indeed, he warns of the danger of allowing political disputes to become impeachments.

Throughout the debates on ratification, advocates for the Constitution repeatedly distinguished between removal from office for a crime and judicial punishment for that same crime. In Federalist 69 Hamilton observed that "The President of the United States would be liable to be impeached, tried and upon conviction of treason, bribery or other high crimes and misdemeanors, removed from office; and would afterwards be liable to prosecution and punishment in the ordinary course of law." He makes the same point in Federalist 65. One is not "liable to prosecution and punishment" for any act other than committing a crime.

Anti-Federalists also understood the power to be limited. Brutus XV, attributed to Robert Yates, observes, "By this paragraph, civil officers, in which the judges are included, are removable only for crimes. Treason and bribery are named, and the rest are included under the general terms of 'high crimes and misdemeanors'. Errors in judgment, or want of capacity to discharge the duties of the office, can never be supposed to be included in these words, high crimes and misdemeanors."

It is also true that many of the impeachments that the House has brought have been for made-up crimes like "neglect of duty" or "abuse of power" and not for real ones. But this fails to explain why bad precedents should be repeated rather than reversed.

For example, if "neglect of duties" is a high crime, what was to be done with a President who is incapacitated by massive stroke as Woodrow Wilson? He was clearly neglectful of his duties, unable to enforce the laws or discharge the duties

of his office. If his affliction had not been kept secret, could he have been impeached? No, because at the time the Constitution made no provision for "neglect of duty." Congress implicitly recognized this when it later enacted the 25th Amendment to establish a process to remove a President for incapacity.

Recently, in United States v. Texas, the Supreme Court majority held that "lawsuits alleging that the Executive Branch has made an insufficient number of arrests or brought an insufficient number of prosecutions run up against the Executive's Article II authority to enforce federal law." Yet it leaves open the question of what is to be done when the executive simply chooses not to "take care that the laws be faithfully executed." The best the court can offer is that "Congress possesses an array of tools to analyze and influence those policies – oversight, appropriations, the legislative process and Senate confirmations, to name a few." Alito, writing in dissent, throws in impeachment as an example of "weapons of inter-branch warfare," but offers no guidance as to its applicability in this case. The majority makes clear that "We do not opine on whether any such actions are appropriate in this instance."

Nevertheless, the Alito dissent has a legitimate point. The Constitution commands the President to "take care that the laws be faithfully executed." What happens if a President refuses to do so? The Constitution clearly does not envision a President arrogating to himself the power to nullify laws once enacted. Such an act would be fatal to the separation of powers.

Indeed, the majority in the Texas case adds, "To be clear, our Article III decision today should in no way be read to suggest or imply that the Executive possesses some freestanding or general constitutional authority to disregard statues requiring or prohibiting executive action."

The Supreme Court seems unable to define when prosecutorial discretion becomes nullification. It simply doesn't believe this constitutional line has yet been crossed. It is a slippery slope, because no law can be perfectly enforced, and the question of how faithfully a law is being executed is purely subjective. What the HSC calls "willful and systemic" refusal to comply with the law at some point may cross that line.

But Congress should tread this ground as carefully as the Court. What is to be done if the law is half-heartedly executed, or over-zealously executed, or if the President is denied the funds he says he needs to enforce the laws. Where is that

line if the law gives enormous discretion to the President to decide the degree of enforcement? At some point Congress may need to confront this issue, but it should do so soberly and with an eye to the precedent it is creating. "Sentence first, verdict afterward" is no way to approach it.

More to the point, by definition, only the President can commit that act, because only the President holds the executive power – not a subordinate who simply carries it out. No matter what authority the statutes specify to subordinates, all executive power is ultimately held by the President. He alone is responsible for it.

Both parties need to ask themselves how much farther down this road they dare to go. Do Republicans really wish to establish an expansive view of impeachment that will surely be turned against conservatives on the Supreme Court or a future Republican president if Congress changes hands? Who will be left to defend that President if we accept this position now? And do Democrats really wish to assert a doctrine of presidential nullification that will enable a future Republican president to refuse to enforce, for example, environmental laws or tax levies he does not like?

Perhaps the only sound remedy was hinted by the Texas decision: "And through elections, American voters can both influence Executive Branch policies and hold elected officials to account for enforcement decisions."

That is the fine point of the matter and takes us from constitutional issues to practical ones.

The American people have historically taken a very dim view of impeachments they see as partisan or political. One-sided impeachments have often been punished harshly at the polls. The impeachment of Mayorkas will undoubtedly delight Republicans, infuriate Democrats and alienate the vast middle who will ultimately decide the election and, in turn, this issue. The upcoming election is the only true remedy to the border crisis.

It is delusional to believe the Senate will vote to remove Mayorkas on the grounds laid out by the HSC. At best it will be a party-line vote. More likely, it will be a bi-partisan repudiation of a misuse of power. The deadly serious crisis on our border will have been trivialized into a partisan caricature.

But let us entertain this delusion for just a moment. Even in a fantasy world in which 2/3 of the Senate actually votes to remove him – absolutely nothing would change, because Mayorkas is simply an agent carrying out the deliberate policy of this administration.

Do my colleagues honestly believe that this crisis will abate by replacing Mayorkas with, say, Ocasio-Cortez, or by replacing Biden with Kamala Harris?

Congress can't fix this with bills that won't be signed, laws that won't be enforced, funds that will be used only to admit illegal aliens but not expel them. And Congress can't fix this by replacing one leftist official with another.

This crisis can only be resolved by replacing the entire administration with one determined to take the actions necessary to restore our nation's sovereignty and protect the rule of law. Only the American people can do that.

Republicans don't need to abuse the Constitution in order to prove our commitment to restore control of our border – we have stood this ground for many years, proved our policies effective during the Trump Administration and passed the strongest border security bill in decades out of this House that will make future abuse of our laws much less likely. Further reforms and appropriations directives certainly ought to be pursued.

But taking the course outlined by the HSC is bad politics and bad policy. It is bad politics because it taints with partisanship what would otherwise be overwhelming national opposition to the Democrats' open borders policy. It is bad policy because it strengthens a dangerous constitutional precedent the Democrats will surely use against conservatives on the Supreme Court and a future Republican administration the moment they have that opportunity.

Most of all, it assigns blame for the border debacle to one man acting on the orders of President Biden, blurring what should be -- and would be -- the crystal-clear reality that to secure our border we must replace the entire administration – and that can only be done by the American people at the ballot box.

As the Founders intended.